TIMING OF FEDERAL PERMITS WORKSHOP SUMMARY

INTRODUCTION

On March 27, 2001, the California Energy Commission (Energy Commission) conducted the Timing of Federal Permits Workshop to discuss federal permit timing issues that may affect the licensing of future power plants by the Energy Commission, to identify those processes that are working well, and to provide recommendations on potential improvements that may be made to address these issues. The workshop was composed of two separate volunteer panels that addressed issues affecting regulatory approvals and interconnection and land use approvals.

OVERVIEW OF ORAL PRESENTATIONS

STAFF PRESENTATION

Mr. Chris Tooker, the Energy Commission's Siting Policy Program Manager, provided an introductory statement, explaining that a revised March 21, 2001 Staff Issue Paper had been to better describe the progress already made in addressing federal coordination issues and better focus the workshop discussions.

Mr. Gary Meunier, representing Aspen Environmental Group (staff's consultant), then summarized the Staff Issue Paper. Mr. Meunier explained that the Issue Paper first looked at the broad variety of Federal permits and agency approvals involved in siting a power plant. Then it focused on several of permit processes that have the potential to constrain the Energy Commission's siting process. These included

- Permit processes under the Endangered Species Act,
- Prevention of Significant Deterioration (PSD) permits under the Clean Air Act,
- National Pollutant Discharge Elimination System (NPDES) permits,
- Federal land use entitlements (e.g., rights-of-way and special use permits) for pipelines and transmission lines or other facilities, and
- Permitting requirements related to Indian Reservations, tribal treaty rights, and Native American concerns.

Mr. Meunier also explained that the paper identified some key issues including: application completeness; delays in review of application materials; development of mitigation measures; agency workload and staffing; coordination and scheduling issues; changes in law or regulation; processes for appeal of agency decisions (e.g., to the U.S. Environmental Protection Agency's (USEPA) Environmental Appeals Board (EAB)); and potential delays in the permitting of pipelines and transmission lines that would need to be developed in conjunction with power plants. In response to a question from Commissioner Laurie, Mr. Meunier confirmed that there are no power plant-specific permit processes at the Federal level, as there are in California.

Mr. Tooker then introduced the USEPA panelists, expressing his appreciation for the USEPA's cooperative and timely participation in the Energy Commission's power plant licensing process.

PANEL 1: REGULATORY APPROVALS

Steven Barhite and Ann Lyons U.S. Environmental Protection Agency Region IX

Ms. Ann Lyons started by providing an overview of the federal permitting process under the Clean Air Act. First, air districts in California issue permits under the State Implementation Plan (SIP), which is mandated by federal law. Such permits are still Federal permits, subject to review by the USEPA. There are also Federally permits, such as Prevention Of Significant Deterioration (PSD) permits, that are issued by the USEPA in some cases, and in other cases by PSD delegated districts.

In response to questions from Commissioner Laurie, she explained that when the USEPA approves a district's portion of the SIP, part of its review is to determine whether a district has adequate legal authority and funding to implement the permit programs required under the Federal Clean Air Act. She also explained that, if a district issues a permit that the USEPA does not approve of, remedies could include taking a direct enforcement action against the source or a procedure where the USEPA can withdraw the permitting program from the state and take over the permitting. She added that this action has never been taken before. She emphasized that it's very important to make the applicants aware of the fact that the USEPA has the oversight and enforcement role for the Federal Clean Air Act. She said that applicants should be encouraged to submit complete applications with respect to Federal requirements.

Ms. Lyons then described the regulatory processes for non-attainment and attainment pollutants. Federal air quality standards have been adopted for ozone, nitrogen oxides, particulate matter, carbon monoxide, sulfur oxides, and lead. Non-attainment pollutants are those for which air quality standards are being violated. Air districts are required to develop and implement a permit program to reach attainment for these pollutants. This permit program is incorporated into the SIP.

PSD requirements apply to attainment pollutants. In many instances, USEPA administers the PSD program. However, some districts have developed their own regulations to implement the PSD requirements and have be delegated PSD authority by USEPA. A district that is delegated PSD authority may have its own administrative remedies to address appeals of PSD permits. However, USEPA's Environmental Appeals Board retains authority to review PSD permits.

Mr. Steven Barhite indicated PSD authority is complicated in California because 34 districts are involved, some have delegated PSD authority and some do not. In response to a question from Commissioner Laurie, he indicated that the California Air Resources Board (ARB) has done a good job of coordinating the processes of these 34 districts. Ms. Lyons added that a further complicating factor is that the programs of the districts have evolved historically to address different kinds of local sources.

Ms. Lyons discussed the need for compliance with Section 7 of the Endangered Species Act and the potential for appeals to the EAB for the federal permits (including those by delegated agencies). She also stressed that the term "mitigation" is not used in air permitting, but that the appropriate term "requirements". Federal regulations address emission control technology requirements and specific requirements for emission offsets for non-attainment pollutants.

Mr. Barhite stated that emission control technologies and emission limits have been an issue in a number of the earlier powerplant cases. However, since ARB issued its report "Best Available Control Technology Guidelines for Powerplants", issues regarding emission controls have been less controversial. Consequently, the main focus has been directed to offsets. Applicants need to work on obtaining offsets early on, looking for sources that can be over-controlled. Mr. Barhite cited the creative use of mobile source offsets for the Otay Mesa project, where the applicant worked with the district, ARB, Energy Commission staff, and USEPA to develop these emission offsets. The key in San Diego was the short attainment horizon, as opposed to the long attainment horizon for the South Coast Air Basin. This makes the short-lifespan offsets, such as mobile offsets, more problematic in South Coast.

Ms. Lyons then explained that on June 30, 2000, the EAB issued procedures for dealing with frivolous appeals on an expedited basis. Commissioner Laurie asked how environmental justice may be addressed by the EAB. Ms. Lyons responded that if environmental justice is addressed during the permit process, the EAB could dismiss an appeal based on environmental justice issues. If not, substantive demographic issues may need to be addressed in the appeals process. In reply to Commissioner Pernell, Ms. Lyons stated that the above-referenced procedures are specific to PSD permits.

Mr. Tooker asked about overlaps and consolidation of the NSR and the PSD programs. Mr. Barhite explained that analyses for the PSD permit often rely on those conducted for the districts NSR program. If the district's NSR analysis is good, then the PSD permit will often follow very quickly thereafter.

Ms. Susan P. Jones, Biologist, USFWS

Ms. Susan P. Jones explained that she has worked on endangered species issues on several power plant projects recently permitted in Kern County. She explained that the mission of her agency is to recover species greatly reduced in numbers primarily due to habitat loss. The U.S. Fish and Wildlife Service (USFWS) has written recovery plans to protect habitat for many of the species listed as threatened or endangered (i.e., listed species). In addition, USFWS has two approval or permitting processes under Sections 7 and 10 of the Endangered Species Act (ESA). Section 7 applies when another federal agency must take an action on a project. Under Section 7 the federal agency must consult with USFWS or the National Marine Fisheries Service (NMFS), if a project could adversely affect a listed species or designated habitat (i.e., a federal nexus exists). Section 10 applies when there is no federal nexus. The USFWS's objective is for no reduction of listed species below current baseline levels, which may require mitigation to achieve this goal.

The Section 7 consultant process has a regulatory deadline of 135 days (30 days to review information provide for completeness, and then 105 days to issue the Biological Opinion). In response to questions from Commissioner Laurie, Ms. Jones confirmed that sometimes field surveys done at certain times of the year are required to provide the information needed to complete the analysis for a Biological Opinion. That is why projects proposed at previously developed or greatly disturbed sites can go through more quickly (e.g., the Elk Hills project that was proposed in a disturbed area). Regarding emergency siting, Ms. Jones indicated that the process can take less than 135 days, but that due to staffing limitations they have not been making the 135-day schedule on unexpedited projects.

Commissioner Laurie asked about the Procter & Gamble project where fairy shrimp were discovered in some tire track indentations, which caused the process to go beyond 135 days. Commissioner Laurie asked if the process has been changed to address power plants at industrial sites. Ms Jones said that pre-approved mitigation (conservation banks) for fairy shrimp has been set up. In addressing a follow-up question by Commissioner Pernell, Ms Jones stressed that the emergency sites being identified by the Energy Commission are industrial sites that have already been surveyed, so permitting could be done quickly without impacting endangered species.

Ms. Jones discussed the California Department of Fish and Game's (CDFG) database for endangered species, and the need for its update and for the staff to maintain this database. Commissioner Laurie then inquired about other studies needed in addition to examination of the CDFG database, for undisturbed sites. Ms. Jones replied that applicants usually have to conduct site studies to determine the existence of listed species. She also said that the USFWS has habitat information that can be provided to the applicant that identifies those species that could likely occur at the site or in the vicinity. The applicant could survey for these species or just assume that they are present, and agree to apply mitigation (e.g., buy acres in a conservation bank).

Ms Jones explained that a Section 10 permit, which is applicable to when a federal nexus is not present, has no mandated deadlines. Therefore it can take much longer than a Section 7 consultation. She recommended that applicants find a federal nexus (some federal jurisdiction) to speed up their project. Under Section 10, the USFWS is writing Habitat Conservation Plans (HCPs), primarily focusing on county-wide plans. USFWS has few staff for this work, and therefore, individual projects have a low priority.

Commissioner Pernell asked about appeals, and Ms. Jones stated that there is no appeals process; the USFWS tries to work out problems with the applicant. The applicant can go up the chain of command in the agency or to court to get a decision changed. Ms. Lyons mentioned that there is the Federal Administrative Procedure Act, which provides for judicial review of agency decisions to determine if they are arbitrary and capricious. Mr. Mulvey and Ms. Lyons also indicated that under the Section 7 consultation provisions, if the endangered species protection provisions were incorporated in the Federal permit that triggered the Section 7 (e.g., a PSD permit), then those permit conditions may be appealable through the applicable appeals process.

Ms. Jones closed by indicating that the USFWS has been working well with the Energy Commission staff. It would helpful if the applicants came to the USFWS earlier in the

process before the project location and components are set, and if applicants selected sites that do not have listed species issues. She mentioned reluctance by applicants to do timely surveys, and the staffing shortage at the USFWS. She also suggested early involvement of the USFWS during pre-filing meetings with the applicants and suggested monthly coordination meetings, such as those conducted between the USFWS and the U.S. Army Corps of Engineers. She asked for more information on upcoming transmission projects. She suggested that the CDFG needs staffing to update the Natural Diversity Database. She recommended the establishment of conservation banks, and suggested using PG&E and SCE lands with habitat value. In response to Commissioner Laurie, it was stated that such mitigation is not necessarily site-specific, but is species-specific.

Mr. Brian Mulvey, National Marine Fisheries Service

Mr. Brian Mulvey described a handout that he provided that outlined the role of the National Marine Fisheries Service (NMFS) and their legal and regulatory authorities for protecting species and habitats (e.g., under the ESA and the Magnuson-Stevens Fishery Conservation and Management Act). In California, ten listed species (of salmon and steelhead) fall under the NMFS jurisdiction. The NMFS is involved when power projects affect aquatic habitats. NMFS's review can be required almost anywhere in California, since these species can be found in coast waters, inland waters and estuaries.

Commissioner Laurie asked about the difficulty of permitting hydroelectric projects. Mr. Mulvey stated that where listed species are present, mitigation would be very difficult. Mr. Tooker asked about the site locations or kinds of impacts that could trigger NMFS involvement. Mr. Mulvey stated that water withdrawal from coastal waters, or river flows and riparian zones, even well inland, could trigger NMFS involvement. For example, construction of an intake in the water could require an Army Corps Section 404 permit, which could, in turn, require a Section 7 consultation with the NMFS. A powerplant that uses water that has been allocated to a water district as part of an existing water right, may or may not require the NMFS's involvement. Section 10 requirements could also be triggered.

As with the USFWS, Mr. Mulvey stated that the NMFS has a staff shortage and that Section 10 permits take longer than Section 7 consultations. The NMFS usually takes the full 135 days for Section 7 consultations. In reply to a question from Mr. Tooker regarding once-through cooling for coastal projects, Mr. Mulvey indicated that the NMFS would be concerned about thermal effects, chemical contaminants, impingement, and entrainment. Mr. Mulvey also identified concerns regarding projects requiring dredging. These projects would require review by the Dredge Materials Management office.

Commissioner Laurie asked about the listed species likely to be encountered in California. Mr. Mulvey stated that inland there are various salmon and steelhead species, but along the coast there are 82 groundfish species and five coastal pelagic species under management, as well as the salmon and steelhead species.

With respect to permitting processes, Mr. Mulvey encouraged early involvement at the pre-filing stage for early guidance to reduce impacts and define mitigation. Mr. Mulvey

also recommended bundling projects together by habitat type and region to made the development of mitigation easier (e.g., conservation banking).

Mr. John P. Grattan, Attorney, Grattan & Galati

Mr. John Grattan stated that problems we have encounter are lack of resources, and the melding of different permit systems or permit objectives. He mentioned that USEPA's and USFWS's participation on the Governor's Green Team has had a positive effect on these agencies. He said that he thought that siting under the current emergency was being handled well, but recommended review of the process and institutional reform, because he doesn't think that either the development community or the regulators want to be in a position of dealing with emergency after emergency.

Mr. Grattan emphasized that before a developer comes in with an application, they should do a true siting alternatives analysis. If such analyses are conducted the applicants should determine what is the best location and size for their project. Mr. Gratten also said that he found it ironic that a smaller project, such as the Hanford project, that did not have a federal nexus (i.e., Section 7 consultation requirements) could experience more delays under Section 10 than a larger project with a federal nexus. However, he indicated that Ms Susan Jones facilitated the Hanford case by allowing the project to contribute mitigation funds to an existing Habitat Conservation Plan.

Commissioner Laurie asked whether with all the overlapping constraints, are there any spots in California without serious constraints. Mr. Grattan replied that there is no perfect spot, but that it is a matter of prioritizing the troubles a developer will need to address. He agreed that there is no comprehensive statewide planning relating to powerplant siting, but that developers do go through the above-cited overlay process to select sites.

Mr. Grattan said the Energy Commission, Federal agencies, and applicants have interacted well together on National Environmental Policy Act (NEPA) and CEQA coordination. He specifically cited the Western Area Power Administration's (WAPA) comfort with the Energy Commission's siting process as an example. They have been able to accept the comprehensive mitigation required by the Energy Commission to prepare an environmental assessment and make a Finding of No Significant Impact (FONSI) to comply with NEPA.

Mr. Gratten said that there have been problems with the Energy Commission's ability to reach decisions when the federal permits were delayed. The Energy Commission has had less of a problem on PSD permits where the local district has provided their determination of compliance, but the Energy Commission has been reluctant to proceed without the Biological Opinion (BO). In addition, Mr. Grattan pointed out that the federal permitting processes provide less opportunity to question or dispute agency findings or decisions (as with the Energy Commission's evidentiary process, which allows cross-examination).

Mr. Grattan suggested the following:

- Early project scoping meetings with federal agencies.

- A program, such as the San Joaquin Valley APCD's, which allows certified consultants to prepare the biological assessment reports required for the Biological Opinion.
- Energy Commission approvals that condition start of construction on the receipt of applicable federal permits. Commissioner Laurie raised the concern that prescribed conditions may have other impacts not previously addressed and thereby make the Energy Commission's CEQA analysis incomplete. Mr. Grattan indicated that such issues would occur infrequently, and could be addressed through the amendment process.

  Mr. Richard Buell, Energy Commission staff, stated that staff works with the Federal agencies to define what that mitigation is likely to be. He also noted that the Energy Commission could not knowingly adopt a mitigation measure that did not conform with federal requirements. He stated that, based on federal agency inputs, the Energy Commission has gone forward with a decision without actually having the Federal permit in hand prior to the decision.
- Provide preliminary approval of PSD permits contingent upon receipt of the Biological Opinion.

Commissioner Laurie asked about the "certified application preparer concept". Mr. Grattan indicated that the applicant would hire a certified application preparer from a list established by the agency. This would provide for consistency between applications and ensure quality applications that could be reviewed expeditiously, and the Federal agency would retain their neutrality in the review and approval process. Mr. Tooker said that information from the San Joaquin Valley APCD could be obtained. Ms. Lyons raised concerns that USEPA could have problems with such an approach and that its ethics officers would need to look at it. Getting good applications is most important, according to both Ms. Lyons and Ms. Jones, but the agencies still need to conduct the decision-making analyses.

Mr. Gary Winters, California Department of Transportation (Caltrans)

Mr. Gary Winters stated that he would focus on Caltrans' cooperative streamlining efforts under the Transportation Efficiency Act of the 21st Century (T21). The development program has a budget of approximate $2-3 billion per year, and Caltrans has 820 to 830 environmental planners to support the program. Key aspects of these efforts include:

- Recognizing cultural differences among agencies and clearly explaining project purpose and need.
- Honest and open disclosure of potential impacts.
- Cross-functional training and interagency rotational assignments (e.g., with the Coastal Commission and Army Corps of Engineers).
- Involving resource agencies at project initiation.
- Use of memoranda of understanding (MOUs) between agencies to define intentions and roles; focus on significant projects.

- Good project scopes and schedules.
- Reducing revisions of design, right-of-way, and environmental decisions.
- Making inter-agency meetings more productive, including having the appropriate people there to make decisions.

With respect to agency staffing, Caltrans has funded five positions with the USFWS, two positions with both the USEPA and Army Corps of Engineers, three with the Coastal Commission, six with CDFG, and three with the State Historic Preservation Office. A hiring freeze at NMFS has prevented the filling of their funded positions. Caltrans has used this approach to ensure review of their projects, not to guarantee project approval.

Caltrans also has interagency partnering arrangements (e.g., a tri-agency partnership with the California Environmental Protection Agency (CalEPA), the Resources Agency, and Housing) to share resources and carry out project enhancements. Caltrans is trying to work together similarly with the USFWS, NMFS, and the Federal Highway Administration (FHWA) to iron out such issues as cumulative and indirect impacts. There is already an MOU between FHWA, USEPA, and the Army Corps of Engineers to work together for resolution of Section 404 permit issues. Caltrans is also working with CDFG in hydraulics/fish passage cross-training among engineers and biologists, as well as participating on the Biodiversity Council and the Resources Agency fish passage work group.

Additional elements include programmatic approaches and agreed-upon procedures, currently being employed with respect to a variety of listed species and for cultural resources. Also, Caltrans is internally assessing cumulative and indirect impacts earlier in the project development process. Caltrans is contributing to GIS and database development work, including adding resources to the CDFG for the Natural Diversity Data Base. Additional efforts include:

- Early design decision-making and stronger change control.
- Development of a statewide standard environmental reference.
- Development of focused environmental documents.
- Mitigation banking and process improvements to incorporate mitigation.

PANEL 2: INTERCONNECTION AND LAND USE APPROVALS

Ms. Nancy Werdel, Western Area Power Administration

Ms. Nancy Werdel began with an overview of the federal lead agency role under NEPA. The lead agency designation is determined by such factors as the magnitude of agency involvement, approval authorities, and their expertise. A lead agency can request expertise from another federal agency. A lead federal agency's responsibility is to make sure that all the federal laws and regulations are complied with, including regulations implemented by USFWS, NMFS, Army Corps of Engineers, USEPA, and government-to-government relations with Native Americans. However, the Western Area Power Admininistration (WAPA or Western) relies on the applicant to actually get the required permits.

Western's process is laid out in its General Requirements for Interconnection, under its open access tariff. This is basically an instruction book for applicants that want to interconnect to Western's system. Key elements include: system studies by Western for impacts on Western's transmission system and the surrounding system; compliance by the applicant with federal laws and regulations; and a letter of agreement for reimbursement of all the funds that Western expends. Ms. Werdel suggested that Western could help other agencies to establish agreements to fund positions at the USFWS, for example, to help with interconnection evaluations.

Ms. Werdel described Western's work with the Energy Commission on the Sutter project. Western and the Energy Commission developed a MOU to develop a joint environmental document. Western prepared a EIS using the Energy Commission's analysis and documentation. Western ensured that ESA Section 7 and cultural resource consultations under federal regulations were carried out. This process included joint public meetings for scoping and the draft and final environmental documents. For the Blythe project Western was able to rely on the Energy Commission's environmental documentation and mitigation measures to reach the conclusion that significant impacts would not occur. This allowed Western to prepare an Environmental Assessment and FONSI, thus, avoiding some of the difficulties that came up in finalizing the EIS on the Sutter project. Western expects to use this process on the next three projects that it has coming to the Energy Commission.

Ms. Werdel then discussed a U.S. Department of Energy "Lessons Learned" article that was submitted to the Energy Commission. The article was based on experiences with an Arizona power plant and the Sutter project. Key points included problems with the Energy Commission staff accepting comments from the federal agency and incorporating that into their testimony, differences of opinion on significance of impacts, and differences from EIS formats expected by the USEPA. However, the two agencies have come a long way since then in working together.

Commissioner Laurie asked about Western's ability to rely on other environmental documents. Ms. Werdel indicated that this can be done provided that all of the requirements of NEPA have been addressed, which can require some supplementary work. The key, according to Ms. Werdel, is that the agencies work together to produce a joint document that meets both agencies' requirements. There could be a scenario (e.g., a transmission line across BLM-administered land) where a third agency (BLM in this example) may adopt a joint document prepared by the Energy Commission and Western if it covered their NEPA requirements.

In response to a question from Mr. Tooker, Ms. Werdel stated that the final staff assessment (FSA) for the Sutter project was Western's Draft EIS. Western then produced a Final EIS for review and public comment prior to the Western decision.

Duane Marti, U.S. Department of Interior, Bureau of Land Management (BLM), and Bob Hawkins, U.S. Department of Agriculture, Forest Service

Mr. Marti introduced a three-page paper that they submitted to the Energy Commission. He explained that both the Bureau of Land Management (BLM) and Forest Service are Federal land management agencies with similar processes.

Mr. Marti described a February 16, 2001 memorandum from President Bush to the Secretaries of Defense, Interior, Agriculture, and Commerce and to the USEPA Administrator that directs all relevant federal agencies to expedite federal permit reviews and decision procedures with respect to the siting and operation of power plants in California.

Mr. Marti then described the agencies' NEPA processes. He explained that the agencies have both done joint environmental reviews with California lead agencies. One of the advantages of the joint review is that the mandated actions, like the public scoping meetings, public review, and public comment period can be done together. A key is the designation and leadership of the federal and state lead agencies. Sometimes the state agency can take more of the lead, but a federal lead agency would still need to be designated. Mr. Marti also stated that the BLM sometimes prepares the NEPA document by incorporating by reference the CEQA document. Mr. Hawkins also explained that the federal agency role would be proportionate to the magnitude of the federal jurisdiction involved.

Addressing an earlier question regarding use of environmental documents, Mr. Marti stated that BLM will evaluate the adequacy of the document to meet NEPA requirements. Generally, BLM finds that older documents are usable if the current proposed action was clearly analyzed, the resource conditions and circumstances are basically unchanged from when they were being analyzed, and no new significant or appropriate alternatives have been identified by the public. With older documents, things may have changed a lot, but some of the information may still be useful. Commissioner Laurie indicated that similar considerations apply for use of older documents under CEQA.

Mr. Marti stated that the key information needed for a timely joint review includes: good project information, maps, project schedules, and previous relevant CEQA and NEPA documents, along with early consultation among the agencies and applicant to develop the best initial project proposal (e.g., in route selection across federal lands).

Ms. Townsend-Smith asked how long a project review usually takes. Mr. Hawkins stated that a complex transmission line across multiple forests and BLM land would easily take two years to process. The time required depends on the complexity of the issues and alternatives analyzed. Both men stated that it would be difficult to say how their agencies could respond to a 21-day or four-month process.

They also discussed their appeals processes. BLM decision appeals can be filed within 30 days of the decision to the Interior Board of Land Appeals (IBLA) under 43 CFR 4. IBLA can impose an immediate stay of construction. IBLA decisions have no required deadline. Forest Service decision appeals can be filed within 45 days of a decision.

Filling an appeal results in a mandatory stay of construction, but is reviewed within 45 days. Construction can not resume until15 days after the decision on the appeal is made. A 30-day review period is required for initial decisions for public notice and review of the decision documents. The total time for an appeal is a minimum of 135 days. Mr. Hawkins stated that it realistically takes longer.

Commissioner Laurie asked about statewide mapping of resources and constraints (i.e., geographical information system (GIS)). Mr. Hawkins stated that some information (e.g., land management plans) is available at the state level, but more specific information is at the individual National Forest offices. In early consultation at the local level using GIS information is very helpful in identifying constraints to powerplant siting. For example, wilderness areas can be defined as constrained. Mr. Marti also emphasized that wilderness areas, wilderness study areas, and wild and scenic rivers represent constraints. The BLM uses GIS for these purposes. Mr. Marti also stated that the BLM and Forest Service have designated energy production areas and utility corridors. He mentioned a comprehensive study of utility corridors done in the early 1990s. Permitting of projects within designated corridors would be easier, and maps showing these corridors are available to applicants.

Mr. Tooker asked whether information on constrained areas was available on the internet. Both Mr. Hawkins and Mr. Marti indicated that it is not comprehensively available. Ms. Werdel stated that Western is working with the Army Corps of Engineers to get WAPA's transmission lines on the Army Corps of Engineer's mapping system.

Mr. Marti then described the heavy workloads at BLM and Forest Service, and the availability of cost recovery processes for additional staff or consultants to process permits. Mr. Hawkins also stated that applicants can conduct some of the necessary studies under the supervision of Forest Service specialists. Mr. Marti cited the advantages of MOUs with other agencies to share the workload and reduce duplication of efforts. Commissioner Laurie expressed appreciation for the efforts of other state and federal agencies in giving attention to Energy Commission priorities. Mr. Tooker stated that the Energy Commission staff, has developed MOUs with federal agencies and recognizes their benefits.

Mr. Stephen V. Quesenberry, California Indian Legal Services

Mr. Stephen Quesenberry stated that there are 109 federally recognized tribes in California, which are those that have a government-to-government relationship with the United States. The size of the Indian lands in California is approximately half a million acres. The individual reservations and rancherias range from less than 50 acres to more than 100,000 acres.

In response to a question from Commissioner Laurie, Mr. Quesenberry stated that California Indian Legal Services receives some of its funding from the federal government, some from the state, and also some directly from tribes.

Mr. Quesenberry stated that with many tribes the tribal councils have been delegated authority by the tribal members to make final decisions relating to environmental impacts on the reservation. But there are a significant number of other California tribes

that operate on a general council governing concept, which means that any major decisions made by the tribe go back to the entire tribe for ratification. This can sometimes delay decision-making.

The jurisdictional framework for projects on tribal lands can be complicated by such factors as land title, who is the project developer, and funding source. In general, in the absence of express Congressional authorization, state laws and regulations do not apply on Native American lands. A number of Supreme Court decisions have qualified tribal sovereignty in certain circumstances such as where the lands are fee lands, the activities may involve non-Native Americans, or there may be significant off-reservation impacts of on-reservation activities. Key aspects of siting a facility on Native American lands include:

- The tribe is a sovereign entity there, with a unique status under federal law.
- The federal government, in implementing federal law, has to do so consistent with its trust responsibility to the tribes.

Mr. Quesenberry then described how there has been a dramatic change in the state's approach to dealing with tribal governments. There has been an increased recognition that the tribes do have sovereignty within their lands and over their people. There has been greater effort in environmental regulation, which affects both reservation and off-reservation areas, to resolve jurisdictional issues without litigation. He stated that a draft inter-governmental MOU that includes federal agencies, the tribes, and the state, which was prepared by Energy Commission staff, is a really good step towards doing that.

Mr. Quesenberry stated that the relationship between the federal government and the tribes is something that is very important to understand. The federal government may have obligations to the tribes that are unique in our legal system. The obligations of that relationship are manifested mainly through a federal tribal consultation process, that is written into law, regulation, and executive orders relating to such issues as policies or actions that may affect tribal interests, impacts on sacred sites and cultural resources, and management of endangered species.

In reply to a question from Ms. Townsend-Smith, Mr. Quesenberry stated that a tribe may be able to develop a power plant without going through the NEPA process, where it was developing it with its own resources on tribal land, and the action would not require some form of federal approval. However, in most cases there would be some federal involvement that triggers NEPA. Regarding state regulation, off-reservation impacts raise a question of whether the state has an interest that it is entitled to protect. Mr. Quesenberry stated that the best approach would be to address the jurisdictional questions without litigation.

In answer to a question from Commissioner Laurie, Mr. Quesenberry indicated that tribal consent to a jurisdictional agreement with the Energy Commission on a particular permitting process would have to be addressed on a tribe-by-tribe basis. However, he also stated that, although California is a huge state with a large number of tribes, there is a statewide council of tribes that deals with forestry issues, and that model could be developed in the area of power generation, as well.

Mr. Quesenberry stated that NEPA compliance can be required if a tribe had a private developer that was going to be using tribal lands for a project, because there's a specific requirement under federal law that contractual agreements related to tribal lands must be approved by the Secretary of the Interior. In addition, tribes are generally subject to federal laws, such as the Clean Air Act and the Clean Water Act. Under these laws the USEPA may delegate, under certain criteria, authorities to the tribes as they would to the states. Not many tribes in California have met those criteria.

Mr. Quesenberry also mentioned the Native American Graves Protection and Repatriation Act and the National Historic Preservation Act, which have protection and consultation provisions with respect to cultural resources. Federal approval would be required for leases and rights-of-way (both new rights-of-way or expansion of existing rights-of-way). On tribal land, tribal consent would be required, as well. There are comprehensive regulations in both of those areas under Title 25 of the Code of Federal Regulations. He reiterated the potential value of intergovernmental MOUs to expedite environmental reviews.

Mr. Quesenberry recommended a publication of the USEPA, prepared by the National Environmental Justice Advisory Council, Indigenous Peoples Subcommittee. It is a guide on consultation and collaboration with Indian tribal governments in environmental decision-making.

Mr. Tooker asked about the permitting of a large stationary source on a Native American reservation without a significant air regulatory program, and Mr. Quesenberry indicated that USEPA would probably be the permitting entity. For siting, the jurisdiction may not be well defined, NEPA may apply, and the use of a MOU may be the best method to sort out the jurisdictional issues.

Ms. Monica Schwebs, Energy Commission

Ms. Monica Schwebs, staff counsel, described some of the pre-workshop meetings that were held with various agencies (including USFWS, USEPA, NMFS, BLM, the Forest Service, WAPA, and the California Public Utilities Commission) regarding permitting and siting, and the ESA in particular. They brainstormed on how to improve the siting process and generated some preliminary recommendations (see the recommendation section below).

Commissioner Laurie asked that these recommendations be formally presented at the next Siting Committee Meeting. A question from the audience regarding the 21-day process was presented and discussed briefly among Commissioner Laurie, Mr. Tooker, and Ms. Townsend-Smith, before the meeting was adjourned.

ANSWERS TO THE QUESTIONS RAISED IN THE COMMITTEE'S WORKSHOP NOTICE

Issue 1: What conflicts exist between the Energy Commission siting process and federal permit processes?

1. *What Federal permits or environmental reviews need to be coordinated with the Energy Commission siting process?*

   Federal permits that need to be coordinated include:

   - Permit processes under the Endangered Species Act, Section 7 Consultations or Section 10 Take Permits.
   - Prevention of Significant Deterioration (PSD) permits under the Federal Clean Air Act, which are, in some cases, delegated to local air pollution control districts.
   - National Pollutant Discharge Elimination System (NPDES) permits, generally administered by local agencies.
   - Federal land use entitlements (e.g., rights-of-way and special use permits) for pipelines and transmission lines or other facilities that are located on or cross federal lands, and
   - Permitting requirements related to Indian Reservations, tribal treaty rights, and Native American concerns.

2. *What problems have been encountered in coordinating federal and state reviews of electricity generating, transmission line and gas pipeline projects?*

   The problems that have been encountered include:

   - Lack of sufficient information for processing federal permits.
   - Lack of sufficient federal agency staff to review applications in a timely manner.
   - Difficulty in developing appropriate mitigation strategies or in establishing mitigation banks.
   - Difficulty of coordinating efforts between federal, state and local agencies to eliminate redundancies.

3. *What guidance does the Energy Commission need to provide applicants to better coordinate permitting and environmental review with federal agencies?*

   a. *What is the optimal timing for submitting permit applications and data to federal agencies to facilitate licensing by the Energy Commission?*

   b. *What steps should be taken to assure that acceptable application materials are submitted?*

      Most all of the panel member emphases the need for early consultation with federal agencies, to ensure that acceptable data is submitted. Panel member suggested that federal agency representative should be invited to pre-filing and project Energy Commission staff meetings. The panel member also recommended that 1) guidelines for information requirements should be provided to potential applicants, 2) the agencies should maintain

good and current database of threatened and endangered species, and 3) the agencies should establish habit conservation banks, which applicants could contribute to meet requirements for mitigation.

4. *Can the Commission do more with the permitting agencies to coordinate schedules, and, perhaps, come to agreement on minimum standard timelines for review cycles and decision milestones that can be reliably adhered to?*

   Staff and panel member suggest identifying federal agency liaisons who would assigned the task of assuring timely review by his or her agency. This person could also serve as an expert resource person for others in his or her agency and for applicants. Where both NEPA and CEQA reviews are required, signing a memorandum of understanding (MOU) that sets out the responsibilities of each agency, including timelines for review.

5. *What steps should be taken to better plan for Endangered Species Act (ESA) review for powerplant projects?*

   If ESA or NEPA review is required, promptly identify the federal lead agency and nexus to ensure that the review can begin as soon as possible. Upon distribution of applications to federal agency liaisons, request the liaisons to determine the federal lead agency and federal nexus for USFWS or NMFS review.

6. *Regarding appeals to the U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB):*

   a. *What can be done to promote timely EAB decisions?*

   b. *Can EAB's governing regulations be changed such that a stay can only be based on the merits of the appeal? Can the regulations be revised to more precisely define the scope of what may be considered in the appeal?*

      The Energy Commission and federal agencies should first ensure that they are producing sound analyses, which address all the requirements of federal regulations. Once an appeal is filed, the Energy Commission staff should work with federal agencies to ensure that the EAB has relevant information on which to make timely decisions regarding appeals.

ISSUE 2: How can the Energy Commission siting process and the federal permit and environmental review process be better coordinated?

1. *For projects to be reviewed under both the California Environmental Quality Act and Federal National Environmental Policy Act (NEPA), how should the reviews be coordinated?*

   a. *What models have worked best on past siting cases?*

   b. *Is there a need to formalize coordinated NEPA/CEQA review processes and standardize documentation?*

Joint NEPA and CEQA review is the best way to eliminate duplication and to facilitate timely review. The agencies should meet early to develop a MOU to identify the responsibilities of each agency, to identify the scope and content of the environmental documents, and to establish schedules preparation for environmental documents. The Blythe case was a good model for a process that worked well.

2. *For projects on or near tribal land, how should project review be coordinated with tribal governments?*

   The Energy Commission should make early contacts with tribal governmental to ensure their input to the siting process.

3. *What formal or informal agreements are needed at an agency level or staff level?*

   a. *Are agency Memorandums of Understanding (MOUs) required?*

      Yes.

   b. *What regulation changes are necessary to incorporate formalized procedures?*

      It does not appear that regulation changes are necessary to formalizes working relationships. Regulation changes could be used to clarify informational requirements for applications and to identify mitigation requiremnts.

4. *Where agency staff resource/workload (and, hence, project priorities) are significant issues, how can the Commission, applicants, and agencies work together to maintain schedules and promote permit processing predictability and reliability? Concepts could include:*

   - *Designate agency staff to work on energy projects as their highest priorities.*
   - *Funding of additional dedicated agency personnel – either on a project-specific basis by applicants or through a fund administered by the Energy Commission or the agency based on projections of applications and charging of fees to applicants on a pro-rata basis.*
   - *Re-allocations of funds or new appropriations to fund additional dedicated positions.*
   - *Utilize applicant-funded but agency-administered and supervised consultant contracts to conduct the analytical portions of the permit processing efforts.*

   Staff and panel members supported all of the above and identified other measures to increase staff resources or make better utilization of resources. See Staff Recommendations below for more details.

STAFF RECOMMENDATIONS BASED ON WORKSHOP DISCUSSIONS

FUNDING RECOMMENDATIONS

Problem: There is an acute need for additional staff and consultant money for federal agencies that must provide approvals for California energy projects.

Explanation:

- For example, a key USFWS office is operating with a third of its authorized staff, is under a hiring freeze, and has no consultants. NMFS and Forest Service are in similar positions.
- There are no signs from Washington that the hiring freeze will be lifted any time soon or that there will be increases in appropriations.
- The number of available personnel must increase to cover the surging demand for federal environmental review of energy projects – not only generation, but also electric transmission line and natural gas line construction.

Recommendation:

(1) The Energy Commission should make a formal request to the Bush Administration to lift the hiring freezes and request additional appropriations for reviewing energy facility permits applications.
(2) If the federal government does not act quickly, the Energy Commission should look into the feasibility of using state money to fund federal positions (as CalTrans has done) or provide consultant assistance to the federal agencies.

PROCESS RECOMMENDATIONS

Problem: The need to expedite review requires that federal and state governments better coordinate their permit approval processes to avoid any unnecessary delays.

Recommendations:

While, in general, federal and state approval processes have become fairly well coordinated, there is room for improvement. We recommend these process modifications:

(1) Federal liaisons: Have each federal agency identify an Energy Commission liaison assigned the task of assuring timely review by his or her agency. This person could also serve as an expert resource person for others in his or her agency and for applicants.
(2) Involvement in Pre-filing: Involve the federal agency liaisons in Energy Commission pre-filing meetings for the purpose of identifying and correcting problems with projects early to avoid delays later in the process.
(3) Prompt identification of lead agency and nexus: Upon distribution of applications to federal agency liaisons, request

a) Prompt identification of the federal lead agency, if NEPA review is required.
b) Prompt identification of any federal nexus requiring review by USFWS or NMFS, if endangered species may be affected.
Note: The federal agencies indicated that prompt identification of the lead agency and any federal nexus would assist them by making it clear quickly what the obligations of the agencies will be.

(4) Coordinated NEPA/CEQA Review: Where both NEPA and CEQA reviews are required, assure that duplication of effort is avoided. Signing a MOU that sets out the responsibilities of each agency is a good way to avoid duplication.
(5) Invite federal agencies in to Energy Commission internal staff project meetings, when appropriate to facilitate inter-agency communication.
(6) Use of Energy Commission staff analysis for DFG take permit: Clarify state law to facilitate DFG use of a Energy Commission staff analysis as an adequate CEQA document for issuance of a take permit.

Targeted Planning Recommendations:

Problem: The lack of advanced planning that identifies known constraints, delays the Energy Commission's licensing process.

Recommendations:

Some examples of areas where targeted advance planning could be useful are:

(1) Providing guidance regarding baseline data need for CWA Section 316(b) report on cooling water intakes: Several of the coastal plants have been delayed because applicants have provided inadequate baseline data for purposes of establishing mitigation for the impact of cooling water intakes. The Energy Commission and interested federal agencies should provide q guidance regarding what is required to avoid future delays.
(2) Determining how to handle growth-inducing impacts. An issue that USFWS has raised in both electricity generation and transmission cases is whether there should be mitigation for growth-inducing impacts. USFWS has faced litigation on this issue. Setting up agency-to-agency discussions to discuss how to handle growth-inducing impacts facilitate USFWS review and prevent federal litigation from interfering with federal approvals.

Long-Range Planning Recommendations:

Problem: The lack of adequate databases and mitigation banks will continue to delay federal permitting processes.

Recommendations:

Some examples of important long-range planning are:

(1) Maintaining a good and current database of threatened and endangered species: A good publicly available database can help applicants avoid causing impacts on

endangered species, and therefore, expedites permitting. Maintaining such a database has become more important with the advent of competition in generation since many applicants are reluctant to tell agencies of their plans in advance for competitive reasons.

(2) Establishing habitat conservation banks: Perhaps the most time-consuming aspect of ESA review is determining what mitigation conditions must be imposed. This can be facilitated by ready availability of habitat conservation banks. The adequacy of current state banks should be reviewed to determine whether more are necessary for planned energy projects.

(3) Becoming a non-federal designated lead agency for ESA compliance: The Energy Commission should investigate whether it can become a non-federal designated lead agency for ESA compliance.